SUPREME COURT, U. S

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-785

CHARLES EVES and FERN EVES,
Petitioners,

v.

FORD MOTOR COMPANY and
NATIONAL COOPEPATIVES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

CLAUDE H. BATES
25 Permanent Federal Building
Evansville, Indiana 47708

JOHN D. CLOUSE
1004 Hulman Building
Evansville, Indiana 47708
Counsel for Petitioners

December 16, 1974

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Constitutional Provisions Involved	2
Statement of the Case	4
Federal Jurisdiction in the First Instance	7
Reasons for Granting the Writ	8
The Court of Appeals Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court	8
Conclusion	10
Appendix A—Order of the Court of Appeals	A-1
Appendix B—Prior Opinion of the Court of Appeals	A-5
Appendix C—Prior Order of the Court of Appeals	A-10
Appendix D—Prior Opinion of the Court of Appeals of Indiana	A-13
Appendix E—Order on Indiana Court of Appeals Denied of Petition for Rehearing	A-29
Appendix F—Order on Indiana Supreme Court's Denial of Petition to Transfer	A-30

CITATIONS

Cases

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers et al. (1970), 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed. 2d 234 ..... 8, 9

Hill v. Martin (1935), 296 U.S. 393, 56 S. Ct. 278, 80 L.Ed. 293 9

Shamrock Oil and Gas Co. v. G. Obie Sheets, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 9

Taylor v. Carryl, 20 How (US) 583, 15 L.Ed. 1028 9

Toucey v. New York Life Ins. Co. (1941), 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 10

Miscellaneous

Constitution of the United States, Article 3 ..... 2, 6

Constitution of the United States, Amendment 10 ..... 2, 6

28 United States Code § 1254(1) 2

28 United States Code § 1332 ..... 6, 7

28 United States Code § 2283 ..... 2, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

CHARLES EVES and FERN EVES,
Petitioners,

v.

FORD MOTOR COMPANY and
NATIONAL COOPERATIVES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

The petitioners Charles Eves and Fern Eves respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 6, 1974.

OPINION BELOW

The order of the Court of Appeals is not reported. It is an "Unpublished Order", not to be cited per Circuit Rule 28. It appears in Appendix A hereto. No opinion was rendered by the District Court for the Southern District of Indiana.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 6, 1974. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Can a United States District Court review a decision of a state appellate court?

2. In the event of a conflict between the state and federal judiciaries lower than the United States Supreme Court, which should yield?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, § 2283:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its judgments.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Article 3:

§ 1. **Judicial power.**—The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time or-

dain and establish. The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

§ 2. **Extent of judicial power—Supreme Court—Trial and places of trial.**—[1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

* * * * * * *

Amendment 10:

Rights reserved to states or people.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

STATEMENT OF THE CASE

Both petitioners filed amended complaints in the United States District Court for the Southern District of Indiana on May 8, 1970, against both respondents. Both petitioners alleged injuries to their person, and the petitioner Charles Eves alleged damages to his property, by reason of an accident occurring October 7, 1968, while Charles Eves was driving, and Fern Eves was riding as a passenger, in a Ford truck equipped with one or more tires manufactured by the respondent, National Cooperatives, Inc. The amended complaint alleged that this accident and petitioners' injuries occurred because of certain defects in the truck and tire.

The claims of both petitioners were submitted for trial by jury in the District Court on October 19, 1970. At the conclusion of petitioners' evidence in chief on October 20, 1970, the District Court entered judgment on motions for directed verdicts in favor of both respondents, and also entered a finding and judgment that the amount in controversy, of each claim, was insufficient to confer jurisdiction upon that court.

Upon appeal the judgment against the petitioner, Fern Eves, was affirmed by the United States Court of Appeals for the Seventh Circuit as to the respondent, Ford Motor Company. (See Appendix B hereto) and dismissed as to the respondent, National Cooperatives, Inc. (See Appendix C hereto) The petitioner, Charles Eves, did not appeal from the judgment against him.

On March 1, 1971, both petitioners commenced actions in the Vanderburgh Circuit Court of Vanderburgh County, Indiana (a state court of unlimited jurisdiction), against both respondents. Both of the complaints filed in that court were virtually identical to petitioners' amended complaints filed in the District Court, except for the amount of damages prayed for. These complaints sought damages for the same injuries and

damages arising out of the same accident and claim, between the same parties, upon which the District Court entered its judgment on October 20, 1970.

Each respondent appeared in the Vanderburgh Circuit Court, filed an answer and a motion for summary judgment, which motions were granted, and judgment was entered for each respondent on April 23, 1971.

Each petitioner prosecuted an appeal from these judgments to the Indiana Court of Appeals. On May 3, 1972 that court rendered its decision, reversing the judgments of the Vanderburgh Circuit Court, and directing that court to proceed with the trial of both petitioners' complaints against both respondents. (A copy of this opinion is Appendix D hereto.)

On June 1, 1972, the Indiana Court of Appeals denied respondents' petition for rehearing. (See Appendix E hereto.)

Respondents filed a petition to transfer the appeal to the Indiana Supreme Court, and subsequently submitted additional authority to that court, specifically the decision of the United States Court of Appeals in the case of Fern Eves v. Ford Motor Company et al. On February 15, 1973, the Indiana Supreme Court denied respondents' petition to transfer. (Appendix F.)

Thereafter, both petitioners commenced prosecution of their claims against respondents in the Vanderburgh Circuit Court.

Respondents brought petitions for injunction against petitioners, seeking to enjoin the prosecution of their above-mentioned claims in state court. Both petitioners filed motions to dismiss these petitions for injunction. The motion to dismiss of the petitioner Fern Eves, averred, *inter alia*:

"2. This Court lacks jurisdiction over the subject matter in this cause for the following reasons:

(a) This cause has been dismissed by this Court.

(b) This Court, on October 20, 1970, as evidenced by Entry in this cause bearing that date held that the claim of plaintiff, Fern Eves, did not amount to a sum in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest.

(c) Jurisdiction for United States District Courts is established by the Acts of Congress and is found in 28 U.S.C.A., Sections 1331 to 1361. The applicable Statute in this cause is 28 U.S.C.A. 1332, which confers jurisdiction on cases where there is diversity of citizenship and the amount in controversy exceeds $10,000.00, exclusive of interest and costs. Jurisdiction for this Court to hear this case was originally conferred on the basis of this Statute. In addition to all of the above reasons, there is now no controversy involving the sum or value in excess of $10,000.00 and, therefore, there is no Statute in existence which confers jurisdiction on this Court.

(d) Article 3 of the Constitution of the United States, which is the Judicial Article, establishes the power of the Supreme Court and the inferior Courts. Section 2 of this Article more specifically establishes the jurisdiction of the Federal Judiciary. Nowhere in the Judiciary Article does the power exist, nor has it been elsewhere conferred, for a Federal Court to enjoin the Court of a sovereign State from the exercise of its lawful jurisdiction. The facts in the case at bar do not involve Constitutional rights, nor other matters of which the Supreme Court of the United States have supervisory jurisdiction, nor is the Supremacy Clause involved. Therefore, by virtue of the United States Constitution, this Court has no jurisdiction to enjoin the lawful proceedings of the Courts of the State of Indiana. Additionally, the 10th Amendment to the Constitution of the United States reserves to the States or its people all powers not delegated to Federal Government."

The motion to dismiss of the petitioner Charles Eves contained substantially identical averments.

The District Court, by implication, overruled the petitioners' motions to dismiss in granting respondents' petitions for injunction. The court entered findings of fact, conclusions of law and orders granting an injunction: enjoining petitioners from prosecuting their actions in state court; ordering them to dismiss these actions within fifteen days; ordering them not to bring any other action upon these claims; and ordering that a copy of the court's order be served upon the Vanderburgh Circuit Court.

The petitioners filed a motion to consolidate their claims for appeal, which motion was granted. Thereafter they filed their notice of appeal.

On appeal petitioners argued, in their brief, that lower federal courts possess no power to sit in review of state court decisions.

FEDERAL JURISDICTION IN THE FIRST INSTANCE

Originally, federal jurisdiction was invoked pursuant to 28 U.S.C. § 1332, which confers jurisdiction where there is diversity of citizenship and the amount in controversy exceeds $10,000.00. However, the District Court found the jurisdictional amount lacking. Presumably, the respondents rely on 28 U.S.C. § 2283, which confers injunctive power to protect the court's judgments.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

As the statement of the case reveals, the District Court granted both motions for a directed verdict and found petitioners' claims were not of sufficient amount to confer federal jurisdiction. Petitioners sued in state court, the respondents in motions for summary judgment pleaded this federal judgment as a bar to the state action, and summary judgment was granted for respondents. The Indiana Court of Appeals reversed the state trial court holding petitioners could prosecute their actions. After that, the United States Court of Appeals affirmed the District Court, holding for respondents. The respondents had petitioned the Indiana Supreme Court (the highest Indiana Court) to "transfer" or review the decision of the Indiana Court of Appeals, and now cited the decision of the United States Court of Appeals in favor of their position. The Indiana Supreme Court denied transfer, declining to change the decision of the Indiana Court of Appeals.

Respondents did not petition this Court for a writ of certiorari, but rather went back to the District Court for an injunction against petitioners continuing their state actions. The Court of Appeals upheld this injunction. There is little doubt that if respondents had petitioned this Court for certiorari, this Court would have had jurisdiction of the matter. Instead, respondents persuaded the District Court to review the decision of the Indiana Court of Appeals and Indiana Supreme Court. This the District Court could *not* do. This Court, in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers et al.* (1970), 398 U.S. 281, 286, 90 S.Ct. 1739, 26 L. Ed. 2d 234, in a fact situation close to the one at bar, discussed the history of the question, and said:

"While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts.

"* * *

"* * * Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.

"* * * Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. * * *"

To this same effect, although in a different context, is *Shamrock Oil and Gas Co. v. G. Obie Sheets*, 313 U.S. 100, 109, 61 S.Ct. 868, 85 L.Ed. 1214.

The Court of Appeals said that the District Court was merely enjoining *parties* and not reviewing a state court decision. Such characterization has been held, by this Court to be insufficient to save respondents' position. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers et al.* (1970), 398 U.S. 281, 288, 90 S.Ct. 1739, 26 L.Ed. 2d 234; *Hill v. Martin* (1935), 296 U.S. 393, 403, 56 S.Ct. 278, 80 L.Ed. 293.

There is now a decision by an Indiana appellate court holding petitioners can prosecute their actions in state court and a decision by a federal appellate court saying they cannot. A clear conflict! In *Taylor v. Carryl*, 20 How (US) 583, 597, 15 L.Ed. 1028, 1032, this Court said:

"The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspec-

> tion in avoiding occasions for placing the tribunals of the States and of the Union in any collision."

Toucey v. New York Life Ins. Co. (1941), 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100, calls for avoidance of friction between the two judicial systems by a yielding of the federal one.

Judicial activism, by the federal judiciary, in the arena of state-federal conflict would seem to be enormously disruptive to the successful side-by-side functioning of the two systems. Solving such conflicts by sheer power can not only be extremely painful to the losing party, but destructive to the existing balance of state and federal interests.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted

CLAUDE H. BATES
25 Permanent Federal Building
Evansville, Indiana 47708

JOHN D. CLOUSE
1004 Hulman Building
Evansville Indiana 47708

APPENDIX

APPENDIX A

Order of the Court of Appeals

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

"Unpublished Order"
Not to be cited,
per Circuit Rule 28.

November 6, 1974

(Argued September 24, 1974)

Hon. Luther M. Swygert, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Richard T. Rives, Senior Circuit Judge*

Charles Eves and Fern Eves, Plaintiffs-Appellants, No. 73-1949 vs. Ford Motor Company and National Co-operatives, Inc., Defendants-Appellees.	Appeal from the States District Court for the Southern District of Indiana, Evansville Division. No. 69 C 69 No. 70 C 20 James E. Noland, Judge

Order

Appellants, Charles and Fern Eves, seek to dissolve an injunction against their proceeding in Indiana Courts on a cause of

---

* Senior Circuit Judge Richard T. Rives of the Fifth Circuit is sitting by designation.

action arising out of a truck accident. The Eves alleged that Ford and National Cooperative had negligently manufactured the truck and its tires, causing the accident. Originally the Eves had filed suit on the claim in the United States District Court for the Southern District of Indiana. After both sides had presented all their evidence, the court directed a verdict for Ford and National Cooperative and also dismissed the complaint on the ground that the necessary $10,000 jurisdictional amount was not in controversy. The United States Court of Appeals for the Seventh Circuit affirmed the trial court on both grounds. *Eves v. Ford Motor Co.*, 466 F.2d 792 (7th Cir. 1972). As said in that opinion:

> The jurisdictional defect did not become apparent until the close of the plaintiff's evidence and was not dealt with until after Trial Judge directed a verdict for the defendants, at a time when the issue was for all practical purposes moot.
>
> Plaintiff's claim was for unliquidated damages of $25,000 for personal injuries. As indicated, her good faith was not questioned. Her claim, made, we must assume in good faith, initially conferred jurisdiction over this suit * * *. [Citations omitted].
>
> * * * * * * *
>
> Defendants here were required to defend on the merits a claim which presented a colorable conformance to the jurisdictional requirements. A persuasive argument is advanced on their behalf that in all fairness, they should not be required to defend on the merits anew in a state court under the circumstances of this case. The directed verdict for the defendants was proper and must stand.

466 F.2d 794, 795. The case came within that class as to which Professor Wright has written:

> Thus, except in the flagrant case, if the jurisdictional issue cannot be decided without the ruling constituting at the

same time a ruling on the merits, the necessary choice is to permit the case to proceed to trial. [Footnotes omitted.]

Wright Fed. Courts 2d Ed. § 33, p. 113.

Subsequently, the Eves brought suit on the same cause of action in the Vanderburgh Circuit Court (an Indiana court of unlimited jurisdiction). On the basis of the earlier proceedings in federal court, the state trial court granted Ford and National Cooperative summary judgment. The Indiana Court of Appeals reversed the trial court and remanded the action for trial on its merits. *Eves v. Ford Motor Co.*, 281 N.E.2d 826 (Ind. App. 1972). Then the United States District Court for the Southern District of Indiana enjoined Charles and Fern Eves from carrying forward this cause of action in the Indiana state courts. The instant appeal is from that judgment.

On oral argument, counsel for the Eves conceded that he did not ask that the earlier Seventh Circuit opinion, *Eves v. Ford Motor Co., supra*, be overturned. Thus, the issue of whether the original decision in the district court was "on the merits" is foreclosed, for the court there clearly held that the proceeding was "on the merits." Having had one opportunity to present their claim and all their evidence in federal court, the Eves should not be allowed to raise the same claim and present the same evidence in another forum.

The only remaining issue is whether the district court had authority to enjoin the Eves from proceeding in state court.

28 U.S.C. § 2283 provides that a federal court may grant an injunction "to protect or effectuate its judgments." The statute authorizes injunctions, such as the one granted in the instant case. See *Lee v. Terminal Transfer Co.*, 282 F.2d 805 (7 Cir. 1960), *cert. den.* 365 U.S. 828, 5 L.Ed.2d 705, 81 S.Ct. 713. It is clear that the district judge had the authority to issue the injunction; and, considering the circumstances of this case, it is clear that he did not abuse his discretion.

The Eves also assert that the district court lacked the authority to issue an injunction, because the issuance of the injunction was a review of the state court's decision, a function reserved to the United States Supreme Court. The Eves' characterization of the district court action is wrong. The district court was merely enjoining parties, who had sought its jurisdiction, from proceeding to undermine the jurisdiction whose protection they had sought. It was in no manner reviewing the judgments of the Indiana state courts.

Accordingly, the judgment of the district court is hereby Affirmed.

(Note: The writer is informed by the clerk that when there is no published opinion, there is no separate judgment of the Court of Appeals—the Order serves as such.)

APPENDIX B

Prior Opinion of the Court of Appeals

In The
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 71-1008

FERN EVES,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY and NATIONAL COOPERATIVES, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
Case No. EV 70-C-20
JAMES E. NOLAND, *Judge.*

ARGUED: MAY 31, 1972—DECIDED: AUGUST 17, 1972

Before KNOCH, *Senior Circuit Judge*, and KILEY and CUMMINGS, *Circuit Judges.*

KNOCH, *Senior Circuit Judge.* Plaintiff-appellant, Fern* Eves brought this action to recover damages for personal injuries sustained by her while riding as a passenger in a one-

* Sometimes in the record spelled "Ferne".

vehicle accident occurring October 7, 1968. Defendant-appellee, Ford Motor Company, manufactured the 1965 Ford F-100 Pick-Up Truck, which was the sole vehicle involved, and National Co-Operatives, Inc., previously dismissed from this appeal, manufactured the tire, the failure of which allegedly caused the truck, then traveling at 50 to 55 miles per hour, first to weave, then to leave the road, plunging down an embankment and striking a concrete culvert. The cab was found to be separated from the chassis when the vehicle came to rest with its contents scattered over the surrounding area.

At the end of the plaintiff's case, the District Court sustained a written motion submitted by each defendant for a directed verdict and also sustained oral motions for dismissal for failure to show that the plaintiff was ever entitled to recover the requisite jurisdictional amount, although the plaintiff's good faith in her allegations respecting the jurisdictional amount was never challenged. Judgment was entered for the defendants and this appeal followed.

The plaintiff's proof showed that her husband bought the truck in April 1965 and used it during the next three and one-half years, driving it a distance of some 47,000 miles, during which no shaking, vibration, shifting or instability of the cab was noticed.

Plaintiff and her husband, who resided in Florida during the winter months, traveled with a summer road show for several years. It was plaintiff's husband who had an aluminum topper bolted to the top of the truck bed. The truck pulled a trailer which served as living quarters for plaintiff and her husband during their travels.

Plaintiff offered Thomas Price, a wrecking service operator, as an expert witness. His testimony was sought to be elicited on the proper method of affixing a cab to the chassis of a truck of this type. The Court, however, concluded that Mr. Price did not qualify as an expert to express an opinion and limited

his testimony to what he had actually observed as a layman. There is no showing as to the nature of the opinion he might have rendered if allowed to testify as an expert. Plaintiff now states that, if allowed to testify, Mr. Price would have proved that the cab was not properly fastened to the frame. Plaintiff cites the Court's ruling as error.

It is, of course, a matter for the Court's sound discretion whether a particular witness is competent to testify as an "expert." *Smith* v. *Uniroyal*, 7 Cir., 1970, 420 F.2d 438, 440; *Redding* v. *Picard Motor Sales, Inc.*, 1 Cir., 1968, 403 F.2d 788, 792.

Ford argues, and we agree, that where a vehicle driven in excess of 47,000 miles without apparent difficulty, experiences a high speed tire blowout, plunges down an embankment, colliding with a culvert, it takes a specially informed and experienced witness to offer an expert opinion respecting the condition of the truck before the cab separated from the chassis, to support a claim that the injuries suffered are the result of a defect existing in the vehicle from the time of its manufacture three and one-half years earlier.

Mr. Price has no formal background in engineering, higher mathematics or physics, or special knowledge respecting the strength of, or measurement of force on, metal, bolts or frames. He described himself as a pretty good mechanic and said he had specific knowledge of how truck cabs fit on frames. He said he has a body shop and a garage at his establishment. Questions put by the Trial Judge elicited the information that it was Mr. Price's employees, not he himself, who had recently changed cabs and bodies of two or three trucks, only one of which involved a Ford F-100 truck. He did not know the weight of the cab or the size or tensile strength of the bolts, and had initially displayed a lack of firm knowledge on the mounting assemblies. He had never seen this particular truck prior to the accident. Only after careful examination of the

witness, did the Trial Judge make his ruling. We find no abuse of discretion.

The jurisdictional defect did not become apparent until the close of the plaintiff's evidence and was not dealt with until after the Trial Judge directed a verdict for the defendants, at a time when the issue was for all practical purposes moot.

Plaintiff's claim was for unliquidated damages of $25,000 for personal injuries. As indicated, her good faith was not questioned. Her claim, made, we must assume in good faith, initially conferred jurisdiction over this suit between citizens of different states. See *St. Paul Mercury Indemnity Company* v. *Red Cab Co.*, 1938, 303 U.S. 283, 292-3; *Emmons* v. *Smitt*, 6 Cir., 1945, 149 F.2d 869, 872, *cert. den.* 326 U.S. 746.

Modification of the statute, Title 28 U.S.C. § 80 (Act of March 3, 1875, c. 137, § 5) which provided the basis for the decision in *McNutt* v. *General Motors Acceptance Corporation of Indiana*, 1936, 298 U.S. 178, 182, cited by plaintiff, renders that case of little assistance here. That statute provided that on discovery of a deficiency in the jurisdictional elements, the Trial Court must dismiss the suit and proceed no further. This language was omitted from Title 28 by the revisions of the Congressional Act of June 25, 1948, c. 646, 62 Stat. 869. The provisions of Title 28 U.S.C. § 80, as transferred to §§ 1359, 1447, and 1919, do not include the restriction on the Trial Judge's discretion.

Defendants here were required to defend on the merits a claim which presented a colorable conformance to the jurisdictional requirements. A persuasive argument is advanced on their behalf that in all fairness, they should not be required to defend on the merits anew in a state court under the circumstances of this case. The directed verdict for the defendants was proper and must stand.

Ford cites a similar occurrence in *Kennison v. Missouri Pacific Railroad Company*, W.D., La., 1965, 241 F. Supp.

545, where judgment on the merits was held to be *res judicata* between the parties despite a jurisdictional defect which did not become apparent until the close of the plaintiff's evidence.

Unlike the situation in *Davenport* v. *Mutual Benefit Health and Accident Association*, 9 Cir., 1963, 325 F.2d 785, on which plaintiff relies, where the plaintiff alleged the equivalent of gross fraud, essential for an award of punitive damages (which the 9th Circuit held could be considered in computing the amount necessary for federal jurisdiction) the District Judge here could well conclude to a legal certainty from the plaintiff's evidence that she could never be entitled to a sum equal to the jurisdictional amount.

Plaintiff testified concerning her own injuries. She said that her ankle hurt and that she experienced pain below the rib cage on the day of the accident. She said her ankle was X-rayed. The results were not made part of this record, but a cast was applied which she wore for almost six weeks. Whether a fracture was sustained was not stated. Plaintiff said she was advised to use crutches or a cane after the cast was removed, which she did when she worked at home for a period which was not indicated. Neither of the two physicians she consulted testified. There was no medical evidence. Loss of wages or earning capacity was not shown. The medical bills were $139.65. In response to a question from her own counsel, plaintiff agreed that she felt she was "in pretty good shape" at the time of the trial.

The judgment of the District Court is affirmed.

AFFIRMED.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

Prior Order of the Court of Appeals

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 28, 1971

Hon. Otto Kerner, Circuit Judge

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. John Paul Stevens, Circuit Judge

Fern Eves,
Plaintiff-Appellant,

No. 71-1008. vs.

Ford Motor Company, National Co-operatives, Inc.,
Defendants-Appellees.

Order of Dismissal.

This matter is before the court on the motion of the defendant-appellee, National Cooperatives, Inc. to dismiss the appeal as to said party.

The plaintiff-appellant's brief was filed in this court on April 6, 1971 and although there were two defendants involved in the proceedings below, under "The Issues Presented for Review" in plaintiff-appellant's brief the issues were stated as follows by plaintiff-appellant:

> "1. Whether the Court erred in granting defendant's motion for a directed verdict;

2. Whether the Court erred in granting defendant's oral motion to dismiss;

3. Whether the Court erred in refusing to permit witness Thomas Price to give opinion evidence."

Further, on page 4 of the plaintiff-appellant's brief under the argument portion of the brief, the following statement appears:

> "As to the defendant-appellee, National Cooperatives, the plaintiff's only contention is that the Court erred in dismissing on the basis of a lack of jurisdictional amount. This will be incorporated in the appropriate section of the Argument. The plaintiff is appealing no other issue regarding that defendant and for the rest of this brief, the word 'defendant' refers to Ford Motor Company."

An examination of the plaintiff-appellant's brief indicates no contention that the court erred in granting the motion of National for a directed verdict.

In the trial of the case in the district court, at the conclusion of the plaintiff's evidence in chief, the court sustained the separate written motion of each defendant for a directed verdict and also sustained a separate oral motion of each defendant for dismissal on the grounds that the plaintiff was never entitled to recover the requisite federal jurisdictional amount. Judgment was entered accordingly in favor of each defendant.

Plaintiff-appellant contends that when a court determines it has no jurisdiction, it must proceed no further and must dismiss the action, citing Federal Rules of Civil Procedure Rule 12(h)(3) and *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). Accepting this contention as being a correct statement of the law, it would appear beyond argument that if at the time the plaintiff rested, the court properly concluded that it was without jurisdiction, the action as to National should have been

dismissed and the purported sustaining of the motion for directed verdict by National was a nullity. If the present appeal were processed to its conclusion insofar as National is concerned and this court affirmed the district court on the jurisdictional question, the litigation as to National would be at an end.

Conversely, however, it appears to us that if the appeal were processed to a conclusion and this court were to hold that the district court was incorrect on the jurisdictional matter, having reached the conclusion that the motion for a directed verdict should be granted as to National, said ruling would continue to have viability. This is particularly true in view of the fact that plaintiff-appellant has not challenged the correctness of the ruling on the directed verdict as to National. A reversal on the sole issue raised as to National could only return the case to the court where the plaintiff-appellant has been precluded from further proceedings by the obstacle of the directed verdict.

We cannot accept plaintiff-appellant's contention that in the event of reversal National would have to defend at a new trial and would be a necessary party for full relief. We are unaware of any reason for engaging in a futile exercise in legalistic procedures.

Accordingly, the motion of National Cooperatives, Inc. is sustained and the appeal of the plaintiff-appellant as to National Cooperatives, Inc. is hereby dismissed.

APPENDIX D

Prior Opinion of the Court of Appeals of Indiana

Attorneys for Appellee Ford Motor Co.:

Fred P. Bamberger
Bamberger, Foreman, Oswald & Hahn
708 Hulman Building
Evansville, Indiana 47708

Attorneys for Appellee National Cooperatives, Inc.:

Gaylon Clark
McCray Clark Statham & McCray
P. O. Box 3567
Evansville, Indiana 47701

Attorneys for Appellants:

Donald R. Ewers
Bates and Ewers
25 Permanent Federal Building
Evansville, Indiana 47708

(Filed May 3, 1972, Billie R. McCullough, Clerk of the Indiana Supreme and Court of Appeals)

In the
Court of Appeals of Indiana
First District

Charles Eves, Fern Eves, Plaintiffs-Appellants, vs. Ford Motor Co., National Cooperatives, Inc., Defendants-Appellees.	Cause No. 771-A-122 (Consolidated With Cause No. 771-A-138)

Appeal from the Vanderburgh Circuit Court
The Honorable William H. Miller, Judge

Lowdermilk, J.

These actions come to us as two separate cases, but inasmuch as they grew out of the same accident and the facts pertaining to each are the same except as to the ownership of the truck and the driver at the time of the accident, we have, therefore, consolidated these causes and shall write upon them as one.

Charles Eves and Fern Eves are husband and wife and were, on the 7th day of October, 1968, occupants in a Ford truck pulling a house trailer, when the right front tire of the truck is alleged to have blown out, causing the truck and trailer to leave the road and in doing so the body of the truck, while in the process of the truck's turning over, became disengaged from the truck, with the occupents remaining in the body, as a result of which they sustained personal injuries and damages to the property of the plaintiffs-appellants, consisting of the truck and trailer.

Suits were filed in the United States District Court for the Southern District of Indiana on or about August 28, 1969, and in which suits an amended complaint was filed on May 8, 1970. On April 22, 1970, pursuant to pre-trial entry in the Federal Court, both plaintiffs and defendants stipulated that the court had jurisdiction over the subject matters and the parties involved in the action.

Subsequently, the causes were tried and at the close of plaintiffs' evidence in each case the court sustained the separate motions for directed verdict of each defendant on the ground that the court had no jurisdiction for the reason that the evidence in each case establishes less than the jurisdictional requirement under the law.

Thereafter, each of the plaintiffs filed their complaints for alleged damages as a result of the same accident, occurring on October 7, 1968, and for the same alleged reasons, as consolidated actions on March 1, 1971 in the Vanderburgh Circuit Court against the defendants-appellees herein.

In the State court defendant-appellee Ford filed answer to each complaint asserting five separate defenses and separate motions for summary judgment, with support thereon. Defendant-appellee National Cooperatives, Inc. filed similar answers and motions for summary judgment in each case in the State court.

On April 23, 1971, the Vanderbaugh Circuit Court entered its judgment in favor of the defendants in each case.

Plaintiffs-appellants filed in their respective cases the same motion to correct errors, which is in the words and figures as follows, to-wit:

> "1. The Judgment is not supported by sufficient evidence upon all necessary elements of defense.

"2. The Judgment is contrary to the evidence in the following respects:

"(a) There is no proof that the Statute of Limitations ran upon the Plaintiff's claim, but on the contrary the evidence clearly indicates that the Statute of Limitations was tolled by the filing of Cause No. EV 69-C-69 in the United States District Court, Southern District of Indiana, Evansville Division entitled Charles Eves vs. Ford Motor Company and National Cooperatives, Inc. on or about February 25, 1970. [sic—actually August 28, 1969.]

"(b) This cause of action is still pending in the United States Court of Appeals for the Seventh Circuit.

"3. The judgment is contrary to law upon the following grounds:

"(a) The entry of October 20, 1970 in the United States District Court, Southern District of Indiana in Cause No. EV 69-C-69 Entitled Charles Eves v. Ford Motor Company and National Cooperatives, Inc. unequivocally holds that the Court was without jurisdiction, and in doing so, the lawsuit resulted in a nullity or no contest by operation of law. It was error for this Court to hold that the entry of October 20, 1970 in the United States District Court was res judicata and bars Plaintiff cause of action before this court.

"(b) On February 25, 1970 [August 28, 1969] Plaintiff timely filed his lawsuit within the Statute of Limitations in the United States District Court, Southern District of Indiana. The Defendants' admitted jurisdiction and the question of jurisdiction was not placed in issue until October 20, 1970, at which time, the Court itself

made jurisdiction an issue. The Plaintiff was properly in the Federal Court without any question as to jurisdiction until the ruling of October 20, 1970. The judgment of the Court is erroneous in holding that the Statute of Limitations bars Plaintiff cause of action.

"4. The judgment is the result of abusive discretion. Plaintiff's claim was properly presented before the United States District Court with jurisdiction admitted as set forth in the Defendants' answers attached hereto and marked Exhibits 'A' and 'B' and the pre trial entry of April 22, 1970 attached hereto and marked Exhibit 'C'. The Defendants' admissions and stipulations as set forth in these exhibits clearly shows that no issue as to jurisdiction in the United States District Court existed until October 20, 1970, at which time the defendants made an about face and challenged the jurisdiction of the court and was sustained. The defendants waited until after the Statute of Limitations would have normally run before challenging jurisdiction. The court abused its discretion in holding that the Statute of Limitations is a bar to Plaintiff's claim presented in this court. Such a holding allows the defendants to advantage themselves through their own inconsistency."

(The memorandum in support of the motion to correct errors is omitted from this opinion.)

Defendants-appellees contend (1) that the statute of limitations had run on plaintiffs' claim; (2) the judgment of October 20, 1970, in the United States District Court was *res judicata*.

Plaintiffs contend that the judgment of the Federal Court can in no way act as *res judicata* as to plaintiffs' claim on the grounds that the Federal Court ruled it had no jurisdiction and if there is no jurisdiction the cause goes as a nullity by operation of law.

Plaintiffs-appellants further contend that the statute of limitations was tolled during the period of time their causes were before the United States District Court, with jurisdiction stipulated in the pre-trial and admitted in the answer to plaintiffs' complaints.

Defendants-appellees contend that plaintiffs-appellants briefs do not comply with Rule AP. 8.3(7), which pertains to the argument portion of their briefs. We are of the opinion that although the argument section of the briefs is not a model, that under the liberal interpretation of the Rules plaintiffs-appellants have discussed their points and cited authorities and that defendants-appellees' contention that the Rules have not been complied with is untenable.

We must agree with defendants-appellees that the documents in the Vanderburgh Circuit Court demonstrated that each plaintiff's claim arose on October 7, 1968, and almost identical complaints were filed in the Vanderburgh Circuit Court on March 1, 1971.

We further agree that the judgments of the Vanderburgh Circuit Court were entered on two separate grounds, (1) first, each plaintiff's cause of action was held to be barred by the two year statute of limitations, and (2) the judgment of the United States District Court for the Southern District of Indiana is *res judicata* of the claims presented by plaintiffs' complaints and constitutes a bar to the further prosecution of such claims against such defendants.

Plaintiffs-appellants did not file authority to sustain their contention that the statute of limitations was tolled during all the time their causes of action pended in the United States District Court. It is not necessary that we answer that contention as we have an applicable statute which covers this citation, namely, Ind. Stat. Ann. § 2-608 (Burns 1967 Replacement):

> "New action after failure-Limitation.—If, after the commencement of an action, the plaintiff fails therein, from any cause except negligence in the prosecution, or the action abate, or be defeated by the death of a party, or judgment be arrested or reversed on appeal, a new action may be brought within five [5] years after such determination, and be deemed a continuation of the first, for the purposes herein contemplated."

The latest case we find in Indiana to guide us on this contention is the case of *Ware v. Waterman* (1969), — Ind. App. —, 253 N.E. 2d 708. In *Ware*, a summary judgment was entered by the trial court in favor of the defendant-appellee. Plaintiff-appellant assigned as error:

> "* * *
>
> "2. The Court erred in failing to give its reasons for sustaining Appellee's Motion for Summary Judgment."

The crux of the appeal in *Ware* is the application of the statute of limitations.

In the case at bar we have heretofore set out the date of the accident and the divers dates of different pleadings and the fact that the suit brought in the Vanderburgh Circuit Court was brought more than two years after the date of the accident and damages allegedly sustained by the plaintiffs-appellants.

We have gone to this trouble because this court lacks precedent or rules to write memorandum opinions, but we shall not unnecessarily burden this opinion with the facts of the *Ware* case, as the same can be readily ascertained from a reading of the case, except such facts as we deem necessary to make this opinion complete.

In the case at bar the question is whether the Journey's Account statute as heretofore set out is applicable so as to render

erroneous a decision of the trial court barring plaintiff's cause of action.

In *Ware*, Judge Sullivan said:

> "In order for the Journey's Account statute, Burns' § 2-608, *supra*, to be applicable it is necessary that an action must have been commenced timely and must have failed, abated or been defeated as specifically prescribed in said Act. We, therefore, must view the facts of this cause in order to determine whether an action was commenced within eighteen [18] months following the death of the alleged tort-feasor Robert P. Stearns as permitted by Burns § 2-607, *supra*.
>
> * * *
>
> "That plaintiffs cause of action filed June 1, 1967, falls within the purview of the Indiana Journey's Account statute, Burns § 2-608, supra, is a conclusion deemed mandatory not only by the clear and unambiguous language of said statute itself, but by reason of the purpose and policy considerations underlying remedial statutes of such nature.
>
> "The purpose and effect of a similar statute was well stated in *McKinney v. Springer* (1851), 3 Ind. 59, wherein the court, at page 63, said:
>
> "'* * * It is also said that the cause of action relied on in this suit could not have been a proper subject of chancery jurisdiction, and that the actions referred to in the proviso should be interpreted to mean actions whereof the courts in which they were brought had competent jurisdiction. To give it this construction would greatly cripple the effect of the proviso, and would defeat, in a great measure, the object the legislature seems to have had in view, namely, *if the plaintiff had made an effort to recover his debt by commencing an action within the limited*

time, but, owing to some error in the mode or form of bringing his suit, or in the proceedings, a proper judgment could not be rendered, and while he was prosecuting such an erroneous action the statute of limitations had run out— to give him sufficient additional time to commence a new suit. * * *' (Emphasis supplied.)

"Such liberal construction has been consistently evident as in *Pennsylvania Co. v. Good* (1913), 56 Ind. App. 562, 566, 103 N.E. 672, 673, wherein the court said:

"'* * * The evident purpose of statutes such as ours is to reach those cases where a suit is brought, and the plaintiff, from some cause other than negligence in its prosecution, fails to obtain a decision on the merits. (citation omitted) A plaintiff who voluntarily dismisses his action cannot be said to have failed to obtain a decision on the merits. A plaintiff cannot be said to "fail" within the meaning of this statute unless he makes an unavailing effort to succeed. If he makes such an effort to good faith, and fails upon some question which does not involve the merits of his case, and if such failure is not due to negligence in its prosecution, the statute may be held to apply. * * *'

"Likewise, in *Abele v. A. L. Dougherty Overseas, Inc.* (N.D.Ind. 1961), 192 F. Supp. 955, the Federal Court interpreted our Journey's Account statute and said at pages 956, 957:

"'While Indiana has never passed on the question the more recent view seems to be that a Journey's Account statute will provide relief against the running of a contractually imposed limitation as well as against the running of a statute of limitations. (citations omitted)

"'The defendant urges, however, that the plaintiff cannot avail himself of this statute since at the time the cause was dismissed in Ohio, he still had several months in which

he could file suit before the two-year limitation came into effect. However, the case of *Jackson v. Prairie Oil & Gas Co.*, 1924, 115 Kan. 386, 222 P. 1114, cited by the defendant would not govern the present case since the statute there involved conditioned the right to refile the suit on the statute of limitations having expired before the first suit was dismissed. Since the Indiana statute contains no such provision, the proper result would seem to be to hold a person whose suit is dismissed on a technical ground is entitled to the full benefit of the saving statute. Indeed this seems to represent the majority position on the question. See Annotation, "Time for New Action," 83 A.L.R. 478 at page 486 (1933).

* * * * * * * *

" 'In view of this conflict and since Indiana has never passed on this question it is necessary to look to the background and purpose of this statute.

> " ' "This statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment [sic] on the merits. Its broad and liberal purpose is not be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts." ' (citation omitted)

* * *

"By reason of the foregoing, we hold that on April 13, 1966, an action was timely commenced against Kenneth Waterman, Special Administrator, which action was thereafter abated by order of the court for procedural reasons on May 8, 1967; that within five years thereafter, on June 1, 1967, plaintiff commenced a new action against the same party defendant for the same claim; that pursuant to

Burns' § 2-608, *supra*, said later action is deemed a continuation of the action begun April 13, 1966; and, that said later action is therefore within the time limitation set forth in said statute.

"Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion."

Relying on the interpretation of the above Journey's Account statute and in view of the liberal construction which has been placed on this statute in Indiana, the only proper result would seem to be that the Indiana Journey's Account statute applies to the case at bar as well as it applied to the *Ware* case.

By reason of the foregoing, we hold that plaintiffs-appellants filed their respective causes of action in the United States District Court for the Southern District of Indiana at Evansville, Indiana, against the defendants-appellees, which action was thereafter abated by order of the court for jurisdictional reasons on October 20, 1970; that within five years thereafter, on March 1, 1971, plaintiffs-appellants commenced their separate new causes against the same defendants-appellees for the same claim; that pursuant to Burns § 2-608, *supra*, said latter actions are deemed a continuation of the actions begun on the 28th day of August, 1969, in the United States District Court and that said latter actions are, therefore, within the time limitations set forth in said statute.

The second alleged error in the motion to correct errors is that the decision of the trial court was contrary to law for the reason that the judgment of the United States District Court for the Southern District of Indiana was not *res judicata* in relation to the plaintiff's claim and did not bar its prosecution in the State court.

From a reading of the entry for October 20, 1970, by the United States District Court, it is seen that the decision and

judgment of the court was based upon a lack of jurisdiction. The pertinent portions of the judgment are in the words and figures as follows, to-wit:

> "At the close of the plaintiffs' evidence in chief, each of the defendants filed their separate written motions for a directed verdict in each of the above captioned causes, and the Court having heard the argument of counsel and being duly advised in the premises now sustains the separate written motions for a directed verdict by the defendant Ford Motor Company in each of said causes and also sustains each of the separate written motions of the defendant National Cooperatives, Inc., for a directed verdict in each of said causes.
>
> "And now at the close of the plaintiffs' evidence in chief, each of the defendants, separately and orally move the court to dismiss each of said above entitled causes of action as to each defendant separately, on the grounds that the evidence establishes that the claim of Charles Eves in said cause No. EV 69-C-69 does not amount to a sum in excess of $10,000 exclusive of interest and costs and the claim of Fern Eves in said Cause No. EV 70-C-20 does not amount to a sum in excess of $10,000, exclusive of interest and costs, and, therefore, the evidence in each case establishes less than the original jurisdictional requirement under the law, and the court having heard the arguments of counsel and being duly advised in the premises sustains each of these separate oral motions of each defendant in each of said causes.
>
> And the court now enters judgment accordingly and the jury is discharged."

It was then ordered, adjudged and decreed by the court that neither of the plaintiffs take anything by way of their amended complaints against either defendant and that the amended com-

plaint be dismissed as to each defendant and the costs of said action be assessed against each of the plaintiffs.

The defendants-appellees would have us believe that the judgment of the United States District Court was a judgment on the merits and that, therefore, this cause being in all respects the same as the cause of Charles Eves filed in Federal Court on August 28, 1969, under Cause No. EV 69-C-69 is the same as the case filed March 1, 1971, in the Vanderburgh Circuit Court.

As can be seen from the judgment of the trial court the attempt by the defendant-appellee is not altogether without a basis. However, this court in dealing with a very similar problem as late as December 13, 1971, in the case of *Cooper v. Co. Bd. of Rev. of Grant Co.* (1971), — Ind. App. —, 276 N.E. 2d 533, 39, stated:

> "The trial court granted both a Motion to Dismiss for lack of jurisdiction of the subject matter *and* for failure to state a claim upon which relief could be granted. It properly granted the Motion to Dismiss for lack of jurisdiction of the subject matter, but was without power to adjudicate whether the complaint failed to state a claim upon which relief could be granted. When the trial court determined that it had no jurisdiction over the subject matter of Cooper's case, it had no power to further adjudicate the question of whether or not the complaint stated a claim upon which relief could be granted. *Stewart v. United States* (1952) (C.A. 7), 199 F. 2d 517; *Fisch v. General Motors Corp.* (1948) (C.A. 6), 169 F. 2d 266, cert. denied 335 U.S. 90, 69 S.Ct. 405, 93 L. Ed. 436.
>
> "The judgment of the trial court is therefore moot[2] insofar as it pertains to the Rule TR. 12(B)(6) Motion to Dismiss."
>
> [2]"A judgment on some matter which cannot have any practical, or legal, effect upon the controversy. (See Black's Law Dictionary (4th ed. p. 1159.))"

The *Fisch* case was one in which the trial court determined that it lacked jurisdiction and in affirming the trial court the 6th Circuit Court of Appeals stated:

> "We cannot yield to plaintiffs' contention that the court's action on the motion to dismiss was premature. If it appeared to the satisfaction of the court *at any time* after the suits were brought that they did not really and substantially involve a dispute or controversy properly within its jurisdiction, *it was its duty to proceed no further and to dismiss the suit.* [Citing cases.] The court was not relieved of this duty by the presence of a constitutional question for the reason that the Constitution is the supreme law." (Our emphasis.)

Certainly if the Federal Court, once it determines that it lacks jurisdiction, cannot decide a question involving a Constitutional matter; another Federal Court once it has determined that it lacks subject matter jurisdiction may not go ahead and make a determination upon the merits. The judgment of the Federal District Court was proper with respect to the judgment that it lacked jurisdiction. It is always within a court's power *sue sponte* to raise the question of subject matter jurisdiction and determine the same. The court having determined that it lacked subject matter jurisdiction, its judgment upon the merit was erroneous, of no force and effect, and is now moot.

The judgment of the Federal Court was not a judgment on the merits and the case lacked the basic elements of *res judicata* which were set out by Judge Sharp of this court in the case of *Wright v. Kinnard* (1970), — Ind. App. —, 262 N.E. 2d 196, 199 (cited by appellees):

> "The basic elements of res judicata are fourfold: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the matter now in issue

was, or might have been, determined in the former suit; (3) the particular controversy adjudicated in the former action must have been between the parties to the present suit; and (4) *judgment in the former suit must have been rendered on the merits.* [Citing cases.]" (Our emphasis.)

We further look to the Indiana Law Encyclopedia, as cited by appellants, to the Section of Courts in Volume 7 at pp. 406, §1, 407, §1, and 411, §4, concerning the jurisdiction of courts and find that material helpful, but more particularly address ourselves to the material found in Volume 17 of I.L.E. at §341, page 385, wherein it is stated:

"In order that a judgment may operate as a bar to a subsequent action on the same cause of action, the proceedings leading up to the judgment must have afforded adequate opportunity for an investigation and determination of the merits, and the judgment must have been rendered on the merits. In general, a judgment is on the merits when it amounts to a decision as to the respective rights and liabilities of the parties, based on the ultimate facts or state of facts disclosed by the pleadings or evidence, or both, and on which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions."

It is elementary, in our opinion, from a reading of the decision of the United States District Court that that court had jurisdiction to determine its jurisdiction and having determined that the case lacked the statutory required $10,000 minimum, the court lacked jurisdiction to render a decision on the merits of the case. That part of the record is surplusage and irrelevant.

The matters now in issue, since the Federal court never had jurisdiction, were never determined, nor could they have ever been determined in the former suit. Furthermore, the judgment in the former suit, as we have heretofore determined, was not rendered on the merits, but rather, on the jurisdiction of

the case. Therefore, from a reading of the Indiana authorities, including *Wright v. Kinnard, supra,* it is seen that this cause had only one of the four basic elements which are necessary before *res judicata* will be determined to be in full force and effect. The only element of those four elements which is present in this case is that "the particular controversy adjudicated in the former action must have been between the parties to the present suit."

The rest of the cases which were cited by the defendants-appellees are not in point for various reasons, primarily because they are either not of this jurisdiction, or the courts in the cases cited did have jurisdiction initially, did render a judgment upon the merits, or could have; and, therefore, are totally inapplicable to the present case.

For the reasons hereinabove stated, the judgment of the trial court is hereby reversed as to the granting of the summary judgments and the court is ordered to proceed with the trial of these consolidated causes in conformity with this opinion. Robertson, P. J. and Lybrook, J. Concur.

APPENDIX E

Order on Indiana Court of Appeals Denial of Petition for Rehearing

In the Court of Appeals of Indiana, First District

Charles Eves, Fern Eves, v. Ford Motor Co., National Cooperatives, Inc.	No. 711 A 122 Consolidated With 771 A 138

The Indiana Appeals Court has on this day

Denied Appellee Ford Motor Company's Petition for Rehearing.

Denied Appellee National Cooperatives, Inc. Petition for Rehearing.

Hoffman, C. J.
1st day of June, 1972.

APPENDIX F

Order on Indiana Supreme Court's Denial of Petition to Transfer

In the Supreme Court of Indiana

Charles Eves, et al., v. Ford Motor Co., National Cooperatives, Inc.	No. 771 A 122-771 A 138

Defendant-Appellee, Ford Motor Company's "Petition of Defendant-Appellee Ford Motor Company to Transfer the Above Cause to Supreme Court of Indiana" is hereby Denied. N. F. Arterburn, C. J.

De Bruler and Prentice, J. J., dissent.

Appellee National Cooperatives, Inc. "Petition to Transfer" is hereby Denied. N. F. Arterburn, C. J.

De Bruler and Prentice, J. J., dissent.

15th day of February, 1973.